No. 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondent*.

BRIEF ON BEHALF OF THE INDIANA PUBLIC SERVICE COMMISSION, THE MICHIGAN PUBLIC SERVICE COMMISSION, THE WISCONSIN PUBLIC SERVICE COMMISSION, AND THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICI CURIAE.

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November 2, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 173 F. 2d 429.

PRELIMINARY STATEMENT.

The Indiana Public Service Commission, the Michigan Public Service Commission, and the Wisconsin Public Ser-

vice Commission are agencies of state government of the States of Indiana, Michigan, and Wisconsin respectively, existing under the provisions of the laws of the respective States, and having complete jurisdiction over natural gas distributing companies operating within the respective States.

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization embracing within its membership the members of the regulatory commissions and boards of the several States of the United States, except Delaware.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to represent the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, representation on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President and of the Executive Committee in the general public interest.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States Court of Appeals for the District of Columbia Circuit reversing certain orders of the Federal Power Commission, hereinafter referred to as the "Commission".

The facts of this case, so far as necessary to be stated for the purpose of this brief, are as follows:[1]

The East Ohio Gas Company, hereinafter referred to as "East Ohio", is an Ohio corporation with its principal place of business in Cleveland, Ohio. East Ohio is solely engaged in the business of direct local distribution of nat-

[1] The facts in the case, as summarized here, are taken from the opinion of the Court of Appeals below (173 F. 2d 429, 429-432).

ural gas within the State of Ohio. All properties and facilities owned and operated by East Ohio lie within the physical boundaries of the State of Ohio, East Ohio distributing natural gas in Ohio by means of an extensive pipe line system, with none of East Ohio's pipe lines crossing State lines. East Ohio makes no sales of any kind to any other company for resale purposes and none of the gas sold by East Ohio is consumed outside of Ohio, that is, none of the gas in the pipe lines of East Ohio flows out of the State of Ohio.

East Ohio has three sources of natural gas supply: Hope Natural Gas Company (hereinafter referred to as "Hope"), the Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle"), and native Ohio natural gas fields. The gas procured by East Ohio from Hope and from Panhandle is from sources outside the State of Ohio, principally from West Virginia, Texas, Oklahoma and Kansas. For the purpose of serving its own customers, East Ohio owns and operates several pipe lines running from the cities and towns where local distribution is completed to points of connection, within Ohio, with the pipe lines of Hope and Panhandle where the out-of-state natural gas is received.

East Ohio has long been subject to complete regulation by the Public Utilities Commission of the State of Ohio, hereinafter referred to as the "Ohio Commission". The Ohio Commission has repeatedly and continuously exercised its regulatory powers over all the business activities and property of East Ohio. This regulation has included the setting of numerous rates, the supervision of acquisitions, sale of property and security issues, the control of accounting principles, inauguration and termination of service, examining service companies and requiring the submission of detailed reports of the Ohio Commission. The complete and thorough regulation of East Ohio by the Ohio Commission is more fully covered in the briefs filed by other parties to this proceeding.

The Federal Power Commission orders now under review require East Ohio's complete submission to the jurisdiction of the Commission and further require preparation of annual financial and statistical reports covering all of East Ohio's properties in operation year by year since 1939. By these orders East Ohio is also required to change its entire accounting system for all of its properties so as to conform to the accounting system prescribed by the Commission; namely, one subscribing to the "original cost" theory of accounting.

The Court of Appeals on February 14, 1949, reversed these orders of the Commission. This ruling is now being appealed to this Court.

THE QUESTION PRESENTED.

The question involved in this case may be stated as follows: Is a company, which owns and operates facilities located only in a single state for the sole purpose of serving its own ultimate-consumer customers, nevertheless a "natural gas company" under the Natural Gas Act where, for the purpose of said business, such company carries through its facilities, between a point of connection with an interstate pipe line company and the cities and towns in which local distribution is completed, natural gas which has been imported into the state by the interstate pipe line company?

SUMMARY OF ARGUMENT.

The states are free, in so far as the Commerce Clause is concerned, to make laws affecting interstate commerce, provided Congress has not acted to prevent such state regulation; and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity. *Minnesota Rate Cases, Simpson* v. *Shepherd*, 230 U. S. 352, 399. Congress has not acted to prevent state regulation of natural gas distributing companies whose facilities are located wholly within a single state.

The facts of the instant case show that the facilities owned and operated by East Ohio are wholly within the State of Ohio, and their operation is primarily a matter of local concern, not requiring national uniformity of regulation. It has been the long-standing and well-considered policy of Congress to permit the states to regulate local utility service. This was the purpose of Congress in exempting the business of local distribution from federal regulation, as revealed by the legislative history and the express language of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, and other cases. This accords with the similar purpose of the exemption provision contained in the Federal Power Act. If the Commission's assertion of jurisdiction in the instant case is valid, then state regulation of direct sales and services to ultimate consumers is inhibited, not only as to gas, but as to electric energy and as to every other character of local utility service so rendered. The Supreme Court has held contrawise as to electric energy in the case of *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U. S. 515. The Supreme Court has never heretofore failed to sustain state regulation of sales to ultimate consumers of whatever kind or character. The tendency of the later decisions is especially pronounced in this direction. *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408.

The instant case does not involve any unique or extraordinary circumstances. Other local distributing companies throughout the country, undoubtedly numbering in the hundreds, likewise receive out-of-state gas which they sell only to their own ultimate-consumer customers within a single state. In the petition of the Commission for a writ of certiorari in the instant case, it is stated that there are now pending before the Commission 43 similar cases. (United States Supreme Court, October Term, 1948, No. 789, at page 19 of petition) The attempted inroad upon state regulation, implicit in the orders under review, unsupported by express statutory authority and diametrically

opposed to the intent of Congress, should be rejected by this Court at the threshold as it has rejected similar attempts in the past.

ARGUMENT.

A Company Which Engages Solely in the Business of Local Distribution of Gas is Exempt from Federal Regulation, Whether or Not Some of its Operations are Interstate in Character.

The Commerce Clause does not prohibit all state regulation of interstate commerce. A long line of Supreme Court decisions, beginning with Chief Justice Marshall's opinion in *Wilson* v. *Black Bird Creek Marsh Company*, 2 Pet. 245, 7 L. ed. 412, rendered in 1829, and followed in the leading case of *Cooley* v. *Port Wardens*, 12 How. 299, 319, 13 L. ed. 996, 1005 (1851), has established beyond question the right of the states, under certain circumstances and notwithstanding the Commerce Clause, to make laws affecting or regulating interstate commerce.

The existence of this right and the circumstances under which it may be exercised are clearly stated in this frequently-quoted declaration by Mr. Justice Hughes, later Chief Justice, in the *Minnesota Rate Cases, Simpson* v. *Shepherd*, 230 U. S. 352, 399 (1913):

> "... It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. (citing cases)"

This principle has been reasserted and applied in Supreme Court decisions too numerous to cite. Through the years, the rule has lost none of its original significance, as well illustrated by the application thereof in *South Carolina State H. Department* v. *Barnwell Bros.*, 303 U. S. 177 (1938), where the Court, in holding constitutional a state statute prescribing motor truck length, width and weight limitations said:

> "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412, and Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints." (page 185)

This same principle was repeated by the Supreme Court in June, 1945, when the late Chief Justice Stone, in *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, after repeating almost exactly the above-quoted language of the *Barnwell case*, added:

> "... When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. (citing cases)" (page 767)

It is plain that the states are free, in so far as the Commerce Clause is concerned, to make laws affecting inter-

state commerce, provided Congress has not acted to prevent such state regulation, and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity.

Whether a particular subject matter of state regulation is primarily a matter of local concern is almost wholly a question of fact, to be determined by weighing all the practical considerations which argue for and against such a conclusion. The function of the courts in this regard was well stated in the very recent case of *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, decided June 3, 1946, which, with its companion case of *Robertson* v. *California*, 328 U. S. 440, decided the same day, sustained both state taxation and regulation of interstate insurance business. In the *Prudential case*, the court made this very clear statement:

> "... concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic. These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action." (page 420)

Much the same view was expressed in *Southern Pacific Company* v. *Arizona, supra*, where the court said (page 770):

> "... in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment. Terminal R. Assoc. v. Brotherhood of R. Trainmen, *supra*. (318 U. S. 8 ...); Southern Ry. Co. v. King, 217 U. S. 524 ..."

We turn then to a consideration of the facts involved in the instant case. These show, without controversy, that East Ohio is solely engaged in the business of direct local distribution of natural gas in the State of Ohio and that all of the facilities owned and operated by East Ohio are located wholly within the physical boundaries of that State. The public interest involved is a matter unquestionably of local concern. The operations of East Ohio involve regulation which cannot be well administered from the federal level.

Not only are distribution systems serving local areas a matter of local concern, but they are matters which by their very nature admit of "diversity of treatment according to the special requirements of local conditions" (to use the language of Mr. Justice Hughes in the *Minnesota Rate Cases*, quoted above). Problems arising from the sale of natural gas to ultimate consumers vary widely from state to state and from company to company. What regulatory laws are necessary and what Commission policies are necessary in administering those laws is obviously dependent upon the local conditions in each state. It is not necessary to elaborate upon the practical difficulties which would be involved if Congress attempted to deal with these local and varying problems on a national basis. The best evidence of the existence of these practical difficulties is that Congress, having before it the problem of regulating the natural gas industry, deliberately chose to exempt the business of local distribution from federal regulation.

The Commission, as a body of limited jurisdiction, must find statutory authority for its action. *New York Cent. Secur. Corp.* v. *United States*, 287 U. S. 12. This is doubly true where a conflict with state jurisdiction is involved. As this court said in *Palmer* v. *Massachusetts*, 308 U. S. 79, 84,

> "... In construing legislation, this Court has disfavored inroads by implication on State authority and resolutely confined restrictions upon the traditional power of states to regulate their local distribution to the plain mandate of Congress ..."

This court aptly summarizes the correct view in *Pennsylvania R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, when it said, in rejecting a contention in determining whether railroad transportation, partly by private carrier and partly by common carrier, is subject to Interstate Commerce Commission regulation under the Interstate Commerce Act:

> "If the concept of transportation is in need of expansion it is for the legislative department of the Government to determine how great the change shall be."

Petitioner, in its brief, relies heavily upon the decision of this Court in *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, and recites the following language from that case (p. 470):

> "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with the local system is essentially national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends . . ."

It is to be noted that the *East Ohio* v. *Tax Commission case* did not determine where interstate commerce ended and intrastate commerce began, and in the above excerpt was discussing the overall movement of the gas from "wells outside Ohio". The present case does not involve the transportation from "wells outside Ohio", and the language of the *East Ohio* v. *Tax Commission case*, accordingly, is in no manner controlling in the present case. The operations and facilities of East Ohio are solely within the State of Ohio and it is only these intrastate facilities which are under consideration in the present case. Whether or not some of the operations of East Ohio in the present case contain any interstate elements, is not relevant.

The question that is controlling of the issue is whether not the Commission has statutory authority to regulate e operations of East Ohio. By both the express language the Natural Gas Act and its legislative history it is early shown that Congress did not intend to grant any ch statutory authority to the Commission.

a) *Such Exemption Is Provided by the Express Terms of the Act.*

Section 1 (b) of the Act provides as follows:

> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."[2]

Section 2 of the Act, containing the definition of terms ed in the Act, reads in pertinent part as follows:

> "When used in this Act, *unless the context otherwise requires*— . . .
>
> "(6) 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> "(7) 'Interstate Commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."[3] (Emphasis supplied).

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[2] 52 Stat. 821 (1938), 15 U.S.C., Section 717(b) (1946).

[3] 52 Stat. 821-2 (1938), 15 U.S.C., Sections 717a (6) and (7) (1946).

The words "unless the context otherwise requires" clearly authorizes the consideration of Section 1 (b) in reaching a precise understanding of what is meant by "natural gas company".

Section 1 (b) clearly states that the provisions of the act shall not apply "to the local distribution of natural gas" or to "facilities used for such distribution." Since East Ohio is engaged solely in the local distribution of natural gas to local consumers and since all of its facilities are used for such distribution, the plain meaning of the language certainly exempts the operations of East Ohio from the regulatory jurisdiction of the Commission.

The Commission is attempting to exercise authority over East Ohio because East Ohio owns and operates large-diameter high-pressure pipe lines which connect up its local distribution system with its source of supply from Hope and Panhandle. The Commission asserts that because of these pipe lines, East Ohio is a natural gas company "engaged in the transportation of natural gas in interstate commerce", under Section 2 (6) of the Act, and thus subject to Commission jurisdiction. Such a contention overlooks the express language of Section 1 (b) which exempts "the facilities used for such distribution."

As pointed out above, the words "unless the context otherwise requires" contained in Section 2, clearly authorizes the consideration of the provisions of Section 1 (b) in reaching an understanding of the term "natural gas company" contained in Section 2 (6).

Where there is an inconsistency between a statutory definition and a section defining the application of an act, the latter is to be given effect. The several sections of a statute should, if possible, be read as consistent rather than as conflicting. *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107.

In *Brewer* v. *Blougher*, 14 Pet. 178, this court stated:

> "It is undoubtedly the duty of the court to ascertain the meaning of the Legislature, from the words used in the statute, and the subject matter to which it re-

> lates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it." (page 198)

Additional words of qualification, needed to harmonize a general and a prior special provision in the same statute, should be added to the general provision rather than to the special provision. *Rodgers* v. *United States*, 185 U. S. 83, 90.

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, this court made the following statement:

> "The words (in a statute) cannot be construed as redundant and rejected as surplusage, where they can be given full effect, and it cannot be assumed that they tend to defeat, but rather that they are in effectuation of, the real object of the enactment." (page 480)

Similarly, this court has stated in *United States* v. *American Trucking Associations*, 310 U. S. 534:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act." (page 542)

Similarly, this court has held that, if possible, effect should be given to every clause and part of a statute. *D. Ginsberg and Sons* v. *Popkin*, 284 U. S. 205.

In *Markham* v. *Cahell*, 326 U. S. 404, it was stated that if a strict ruling of a law results in the emasculation or deletion of a provision which a literal reading would preserve, the latter is to be preferred. It is a general rule of statutory construction, that in determination the meaning of words used in a statute it is necessary to consider the context of the statute and the policy of the law, with due regard for the purpose for which it was enacted. *United States* v. *Dotterweich*, 320 U. S. 277; *United States* v. *Raynor*, 302 U. S. 540.

The term "local distribution" is not defined in the Natural Gas Act. Accordingly, it is proper to look to the legislative history to see what Congress meant by that term. Clearly, Congress was thinking of the business of local distribution—not any mechanical text based on the kind or character of pipe used. This is established by the legislative development of Section 1 (b) to its present form.

(b) *The Legislative History of the Act Indicates That Such Exemption Was Intended*

The purpose of Congress in framing the Natural Gas Act was clearly to occupy only so much of the regulatory field, as it understood, in the light of the decisions of the Supreme Court, could not be reached by state authorities under ordinary circumstances. Congress desired only to fill in the hiatus or gap in regulation that then existed. This is made self-evident not only by reading of the express language of the Act but also by a review of the legislative history.

Federal regulation of interstate natural gas pipeline companies was first proposed in the 74th Congress. Such a proposal was contained in Title III of H. R. 5423—74th Congress, introduced on February 6, 1935. H. R. 5423 was subsequently enacted into the Public Utilities Act of 1935. Title III was deleted, however, prior to enactment because

of opposition and criticisms to certain of its provisions and because the Federal Trade Commission had not yet completed its investigation and report of utilities which was then in progress. See Federal Utility Regulation Annotated (1943) Public Utility Reports, Inc., pages 627-629.

On March 6, 1936, H. R. 11662—74th Congress, which bill related exclusively to the regulation of natural gas companies, was introduced. The hearings on this bill were held in April 1936 before a subcommittee of the House Committee on Interstate and Foreign Commerce.

Mr. John E. Benton, then General Solicitor of this Association, testified before this Committee on behalf of the Association in these hearings. His statement contained the following remarks which are particularly pertinent since they were apparently agreed to by the Committee as shown by revisions subsequently made in the bill and by the report later filed by the Committee.

> ". . . The United States Supreme Court has recognized that the distribution of gas locally to consumers either for domestic or industrial use is a local business and may be reached and controlled and regulated by local authorities, municipal and States, as provided by State law, so long as Congress withholds its hand from regulation . . ." (Printed Hearings, page 85).
>
> "Our request is that the Congress in drawing any legislation in this field, shall clearly provide in the Act that it shall not apply to local utility business. This bill appears to have been drawn for the purpose of conforming to that request just as Congress conformed to similar requests in the passage of other Acts within the past two years." (Printed Hearings, page 86.)
>
> "What the State Commissions ask Congress to do, is to regulate interstate intercompany transactions, but not to regulate the rate to any customer whether he takes for industrial or domestic use; to regulate a sale price of gas only when sold for a resale." (Printed Hearings, page 95).

Mr. Benton called attention to the fact that the proviso to Section 1 (b),[4] as it then existed in H. R. 11662, exempted local distribution only if such distribution was in low-pressure mains. (Printed Hearings, page 91). On behalf of the Association he presented a suggested amendment to correct this, so that it would be perfectly clear that any sale to an ultimate customer, whether from a high or low-pressure main, would be exempt from federal regulation, and thus subject to state regulation.

The exact wording of Mr. Benton's proposal was not accepted by the Committee but the Committee made revisions in Section 1 (b) designed to accomplish the same purpose as will be subsequently pointed out. The testimony of all witnesses who touched upon the point was that H. R. 11662 was not intended to encroach in anyway on state jurisdiction but on the contrary, was intended to complement state regulation and to fill the gap in regulation as it then existed. Mr. Dozier A. DeVane, then Solicitor for the Federal Power Commission, made the following statements at the Committee hearing:

> "The whole purpose of this bill is to bring under federal regulation the pipelines and *to leave to the state commissions control of distributing companies and over their rates, whether that gas moves in interstate commerce or not.*" (Printed Hearings, page 24, emphasis supplied).
>
> "The real question we are dealing with here is this: There is a complete hiatus in the regulation of rates charged by these pipe line companies to the local distributors of gas throughout the United States and we are trying to augment State regulation by conferring

[4] Section 1 (b) of H. R. 11662—74th Congress, provided as follows:

"The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to the facilities used for such distribution or to the production of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

the authority upon a Federal agency to fix those rates." (Printed Hearings, page 41).

The House Committee, after completing the hearing on H. R. 11662, revised the bill and reintroduced it as H. R. 12680—74th Congress on May 12, 1936. On May 13, 1936, the House Committee on Interstate and Foreign Commerce favorably reported H. R. 12680, Report No. 2651—74th Congress, 2nd Session. H. R. 12680, revised Section 1 (b) as it had been contained in H. R. 11662, in that it omitted all reference to high-pressure and low-pressure mains and provided specifically for federal regulation of sales for resale and for no other regulation of sales. The exact wording of Section 1 (b) as contained in H. R. 12680 was as follows:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of such gas for resale to the public, and to natural-gas companies engaged in such transportation or sale, but shall not apply to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only."

The elimination of all reference to high-pressure and low-pressure mains carried out the proposal urged by Mr. Benton at the Committee hearing; namely, that no local distribution was to be subject to Federal regulation regardless of the manner or method of its delivery. The Committee Report to accompany H. R. 12680 contains the following statement:

> "The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense an usurpation, of State regulatory authority . . ." (page 2)

H. R. 12680 was not acted upon by the 74th Congress but was re-introduced on January 29, 1937 as H. R. 4008—75th Congress. The House Committee on Interstate and Foreign Commerce held hearings on this new bill in March, 1937. H. R. 4008 was never reported out but was reintroduced as H. R. 6586—75th Congress with Section 1 (b) taking the exact form in which it appears in the Act today, which is as follows:

> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

H. R. 6586 later became the Natural Gas Act. In its report, favorably recommending H. R. 6586, (Report No. 709, 75th Congress, 1st Session), the House Committee said:

> "If enacted, the present bill would for the first provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present

islation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

. . . . .

"... The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies."

. . . . .

"Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions."

In language, expressly covering the present situation, the Committee forcefully stated:

"That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers *the Commission would have no authority over distribution, whether or not local in character.*" (Emphasis supplied)

The intent of Congress, that the Commission should not have jurisdiction over any local distribution business, could not have been stated in any plainer or more unambiguous words than those emphasized in the above quoted paragraph.

Since the Committee, in its determinations, had before it the decision in the *East Ohio* v. *Tax Commission case, supra,* the conclusion is self-evident that such language expressly excludes any application of that case to the present situation.

When H. R. 6586 reached the floor of the House on July 1, 1937, Congressman Lea, Floor Manager for the bill, repeated the substance of this statement (81 Cong. Rec. 6721). Congressman Wolverton, also a member of the Committee which reported the bill, made substantially the same statement (page 6723).

The Senate Committee on Interstate Commerce held no hearings on H. R. 6586 after it passed the House but reported it favorably on August 9, 1937. The report (Senate Report No. 1162, 75th Congress, 1st Session) merely quotes verbatim the House Committee Report on the same bill. Senator Wheeler, Chairman of the Senate Committee, discussed the bill when it reached the Senate floor on August 19. Pertinent to the questions under consideration, Senator Wheeler said:

> *Mr. Wheeler:* "It (the bill) does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce . . ."
>
> *Mr. Austin:* "Is the bill limited in its scope to the regulation of transportation?"
>
> *Mr. Wheeler:* "Yes, it is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale . . . and let me say to the Senator that, as a matter of fact, the bill does not interfere with state regulation, in any way, shape, or form." (81 Cong. Rec. 9312).
>
> *Mr. Wheeler:* "There is no attempt and can be no attempt under the provisions of the bill to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas." (81 Cong. Rec. 9313).

The bill did not pass the Senate in 1937 but went over until the following summer when it was passed on July 7, 1938 without further debate and after the adoption of two minor amendments relating to other matters. (83 Cong. Rec. 8347) The bill was approved by the President on June 21, 1938 and became the Natural Gas Act.

As the legislative history clearly shows, the reason for confining regulation under the Act to sales for resale, was the determined purpose of Congress to leave all consumer sales to state regulation.

The judicial interpretation which this Court has placed upon the Natural Gas Act clearly reflects the Congressional intent. In *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 U. S. 498, the Court said:

> "An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." (page 506)

In *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U. S. 456, this Court said:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry-federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess." (page 467).

Other judicial expressions by this Court are of a like character:

"We pointed out in *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 US 498, 506, 86 L ed 371, 376, 62 S Ct 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 US 298, 68 L ed 1027, 44 S Ct. 544, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 US 83, 71 L ed 549, 47 S Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong. 1st Sess. p 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' § 1(b).

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the Kansas Natural Gas Co. Case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. (S. Doc. 92, Pt. 84-A, c XII, Final Report, Federal Trade Commission to the Senate pursuant to S. Res. No. 83, 70th Cong. 1st Sess.) State Commissions, independent producers, and communities having

or seeking the service were growing quite helpless against these combinations. (S. Doc. 92, Pt. 84-A, c XII, XIII, op. cit., supra, note above) These were the types of problems with which those participating in the hearings were preoccupied. (See Hearings on H. R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong. 2d Sess; Hearings on H. R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong. 1st Sess.) Congress addressed itself to those specific evils." (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610).

This expression is reaffirmed in *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 591, 600. In *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, this Court stated:

"In a series of decisions announced prior to the passage of the Act, this Court had held that, although Congress had not acted, the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States. (*Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 US 298, 68 L ed 1027, 44 S Ct. 544 (1924); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 US 83, 71 L ed 549, 47 S Ct 294 (1927); *State Corp. Commission* v. *Wichita Gas Co.*, 290 US 561, 78 L ed 500, 54 S Ct 321 (1934)). As was stated in the House Committee report, the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.'" (page 689)

In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U. S. 507, this court expressed a similar view, saying:

"Shortly then, as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipeline carrier. This was true of sales not only for domestic and commercial uses but also for industrial consumption, at any rate

whenever the interstate carrier engaged in distribution for all of these uses. On the other hand, sales for resale usually to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority.

"This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act. To reach those sales and prevent the hiatus in regulation their immunity caused, the Act declared in § 1 (b): (Section 1 (b) quoted at this point)

"This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. They were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." (page 514 to 516)

This review of the legislative history of the Act clearly shows that, as stated by Mr. DeVane, *supra:*

"The whole purpose of this bill is to bring under federal regulation the pipelines and to leave to the state commissions control of distributing companies and over their rates, *whether that gas moves in interstate commerce or not.*" (Emphasis supplied)

The present contention of the Commission is diametrically opposed to the intent of Congress. Congress did not authorize federal regulation of the business of local distribution.

It will be noted that Section 1(b), as originally proposed in H. R. 11662—74th Congress, provided for the exemption of "natural gas moving locally in low-pressure mains." Following the suggestion of Mr. Benton, all reference to

type or character of mains was eliminated in subsequent bills and in the final enactment of Section 1 (b). The legislators, by this action, provided for exemption of just those operations of East Ohio, which the Commission now claims subjects East Ohio to Commission jurisdiction.

It is plain that Congress intended to declare the need for federal regulation only to those matters which were not subject to regulation by the states; and it followed that intent by declaring, in Section 1 (b) that the Commission shall not have jurisdiction over "local distribution of natural gas or to the facilities used for such distribution." The attempted extension of federal jurisdiction present in the instant case, and based on vague and implied powers, should be rejected by this Court. It is a well-settled principle that supersedure of state power by federal power cannot be implied but must be plainly and positively expressed. *Palmer* v. *Massachusetts*, 308 U. S. 79; *Kelly* v. *Washington*, 302 U. S. 1.

(c) *The Construction Which Has Been Placed Upon Analogous Provisions of the Federal Power Act Establishes Such Exemption*

The operations of East Ohio do not present an isolated and unique situation. East Ohio is subject to complete regulation by the Ohio Commission. There is no gap or hiatus in their operations which requires the intervention of federal regulatory authority. The Commission, itself, in its petition for a writ of certiorari in the present case points out that 43 similar cases are now pending before it. Undoubtedly, throughout the nation there are hundreds of local distributing companies, subject to complete regulation by the respective state commissions, who receive out-of-state gas from interstate pipe line companies. This, then, presents an alarming picture. If the Court were to sustain the contention of the Commission as to East Ohio, serious encroachment on state authority throughout the nation would result. The Natural Gas Act envisioned no such

horrific result—it was intended to supplement, not supplant, state regulation.

In the enactment of the Natural Gas Act, Congress was but following a settled policy of respecting the jurisdiction found to be exercised by the state commissions. In 1929 the state commissions, at the Annual Convention of the National Association of Railroad and Utilities Commissioners, adopted a resolution as follows:

> "*Resolved*, That, whereas under the principle established by the decision of the United States Supreme Court in *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, state authorities, in the absence of federal legislation, retain power to regulate local service of utilities which operates across state lines, including the rates for such service, this Association asks Congress not to interfere with the continued exercise of that power as to any class of public utilities by legislation vesting power to regulate such service and rates in any federal tribunal." (Proceedings, 41st Annual Convention, Natl. Assn. of R. R. & Util. Comm'rs., page 369).

This resolution was presented to the Congress from time to time when bills providing for federal utility regulation were under consideration. Congress complied with the request contained in this resolution.

Section 221 of the Communications Act of 1934 explicitly provides that nothing in the Act shall be construed to give the Federal Commission jurisdiction with respect to wire telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign commerce, in any case where such matters are subject to regulation by a state commission or by local governmental authority."

Section 201 (a) of the Federal Power Act, approved August 26, 1935, limits the jurisdiction of the Federal Power Commission in such fashion that it does not extend to any sale of power to a consumer.

It thus appears that, in conformity with the general plan of our government, under which matters of local concern, which do not so affect the interest of the states generally as to require federal control, are left to be dealt with by the states; control over the sale of gas, of electric energy, and of exchange telephone service, has been claimed by the states and has been recognized and respected by the Congress.

The striking fact, developed by a study of all the Supreme Court decisions bearing on the subject, is that not once has the Supreme Court failed to sustain state regulation or taxation of sales to ultimate consumers of whatever kind or character. As Professor Thomas Reed Powell has said in his exhaustive survey of the cases (Harvard Law Review, Vol. LVIII, No. 7, 1945, page 1082):

> "... the Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption ..."

It is also true that the trend of recent Supreme Court decisions runs in favor of sustaining state authority. As this court very recently said in *Prudential Insurance Co.* v. *Benjamin, supra:*

> "... the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce ..." (page 420)

The close similarity between the situation involved in the present case arising under the Natural Gas Act and the case of *Connecticut Light and Power Company* v. *Federal Power Commission*, 324 U. S. 515, arising under the Federal Power Act, is especially noteworthy. The *Connecticut case* involved the use of electric power lines for the transmission of energy to points of local distribution, whereas,

the present case involves the transmission of gas by pipe line to points of local distribution. The statutory background of the *Connecticut case* is similar to that of the present case. Section 201 (b) of the Federal Power Act provides as follows:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Section 201 (e) provides:

> "The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this part."

The Supreme Court in the *Connecticut case* sustained, in effect, the state regulatory authority and in language very applicable to the present situation, discussed the meaning of the phrase, "facilities used in local distribution". At page 530 of that decision, the Court stated:

> "But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what it said by the words 'but shall not have jurisdiction, except as specifically provided in this Part or the Part next following . . . over facilities used in

local distribution.' Congress by these terms plainly was trying to reconcile the claims of Federal and of local authorities and to apportion Federal and state jurisdiction over the industry. To define the scope of state controls, Congress employed terms of limitation perhaps less scientific, less precise, less definite than the terms of the grant of Federal Power. The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation of jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.

"Nor do we think the exemption of 'facilities used in local distribution' exempts only those which do not carry any trace of out-of-state energy. Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction 'over facilities used in local distribution.' To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Power Commission because power from out-of-state however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control. It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities. There is no specific provision for Federal jurisdiction over accounting except as to 'public utilities'. The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution."

This construction which the Court has placed upon the analogous provisions of the Federal Power Act, is certainly pertinent to the matter now under review, and as such, establishes the exemption of East Ohio from the regu-

latory authority of the Commission. This Court further stated in the *Connecticut case:*

> "In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution, the process of reducing energy from high to low voltage in subdividing it to certain ultimate consumers, the Commission has misread the decisions of this court. No such rule of law has been laid down."

This statement is equally applicable to the reduction of natural gas from high pressure mains to low-pressure mains in subdividing it to serve ultimate consumers. As stated by the court, this process is not excluded from the business of local distribution. The present facilities of East Ohio, therefore, do not constitute a sufficient basis for the exercise of federal jurisdiction.

CONCLUSION.

It cannot be too strongly emphasized that no question of federal power is presented here. This case, as with *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 355, "presents the narrow question of what Congress did, not what it could do." The extension of federal control into traditionally local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." *Palmer* v. *Massachusetts*, 308 U. S. 79, 84. This Court has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211. And, as said in *City of Yonkers* v. *United States*, 320 U. S. 685:

> ". . . where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control the existence of federal authority

to act should appear affirmatively and not rest on inference alone."

That the Ohio Public Utilities Commission has both constitutional and statutory power to regulate every phase of East Ohio's operations is not questioned. That allowance of Federal Power Commission jurisdiction over East Ohio's accounting practices will produce overlapping Federal-State regulation, and result in an increased burden on consumer rate-payers, cannot be denied. That such overlapping regulation, in this case where the state is fully competent to act, violates the express language of the Act and the intent of Congress in framing the Act, is obvious.

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted on behalf of the Indiana Public Service Commission, the Michigan Public Service Commission, the Wisconsin Public Service Commission and the National Association of Railroad and Utilities Commissioners, amici curiae.

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November 2, 1949.